

ASIA COMMERCIAL FINANCE LTD.

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v.

UDAI NARAYAN PANDEY

HIGH COURT, SINGAPORE
KAN TING CHIU JC
[ORIGINATING SUMMONS NO. 1335/86]
24 AUGUST 1991

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CIVIL PROCEDURE: *Charging order - Order nisi - Whether there were sufficient causes for refusing to make the order absolute - Judgment debit outstanding on day order absolute - Relates back to date of order nisi - Whether necessity for exact amount.*

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On 20 February 1987 the plaintiffs obtained judgment and possession against the defendant in relation to 2 properties (the Bristol properties) which had been mortgaged to the plaintiffs by the defendant. The plaintiffs obtained a charging order *nisi* against the defendant in relation to another property at Bristol Court in which the defendant had a 1/3rd interest and which was not subject to the mortgage. However the parties did not proceed with the hearing to make it absolute. The plaintiffs went into possession of the Bristol Road properties as mortgagee in possession. They rented out the properties and eventually sold them in 1990. A dispute arose as to the amount owing by the defendant to the plaintiffs and the plaintiffs applied to restore the application to make absolute the order *nisi*.

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The defendant filed an action against the plaintiffs for damages and other reliefs arising out of the plaintiffs' alleged breach of their duties as mortgagee and mortgagee in possession.

The thrust of the defendant's contentions were that unless there were proper accounts, he would not know what was owing and was therefore unable to make payment to clear the charge and that before a charging order can be made absolute, any variations in the debt outstanding must be taken into account.

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The defendant also applied for a stay of execution of the plaintiffs' judgment pending the trial of his claim. The Assistant Registrar declined to make absolute the charging order *nisi* and discharged it with costs. The defendant's application for stay was allowed.

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The issue was whether the dispute over the accounts and the defendant's allegations of breach of duty on the part of the plaintiffs were sufficient causes for refusing to make absolute the order *nisi*.

Held:

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[1] An order absolute is not a second charge, but is a confirmation of the order *nisi*. A charging order *nisi* should be for the amount of the judgment debt outstanding on the day of the application for the order to be made absolute, and when the order is made absolute, it relates back to the date of the order *nisi*. The order absolute takes effect from the date of the order *nisi* for the sum owing on the day when the order absolute was applied for. That sum will not be increased by any interest accruing in the intervening period, or be reduced by any payments made in that time, or any damages payable by the creditor to the debtor.

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[2] The argument that a debtor has to know the exact amount payable to release the charge is not a reason for denying the creditor the security of a charge. The sum specified in a charging order is not necessarily the sum to be paid to free a charge. If there are earlier payments made by the debtor or if there are accounts to be taken, the amount may be

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a reduced. It is a fallacy to take the charging order to have fixed the amount due from the debtor to the creditor, or to remove the debtor's right to proper accounts; these are matters to be considered separately.

b [3] The defendant therefore has failed to show why the charging order *nisi* should not be made absolute. The charge *nisi* is to be made absolute with the modification that it shall relate specifically to the defendant's one-third interest in the property.

[4] The defendant should not be granted a stay of execution as they had failed to dispute or comment on the revised accounts provided by the plaintiffs, failed to diligently prosecute his claims in Suit No. 1951 of 1990 as the further amended statement of claim had yet to be filed, failed to identify any special circumstances in support of his application.

[Plaintiffs' appeal allowed with costs.]

c **Cases referred to:**

Haly v. Barry [1868] Ch App 452 (*fol*)

Brereton v. Edwards [1888] 21 QBD 488 (*cons*)

Rainbow v. Moorgate Properties Ltd. [1975] 2 All ER 821 (*cit*)

Roberts Petroleum Ltd. v. Bernard Kenny Ltd. [1982] 1 All ER 685/[1983] 1 All ER 564 (*cons*)

d **Legislation referred to:**

Rules of the Supreme Court 1970 [Sing], O. 50 r. 1, O. 83

For the plaintiffs/appellants - Johnny Cheo

For the defendant/respondent - Mansur Husain

JUDGMENT

e **Kan Ting Chiu JC:**

The plaintiffs, the Asia Commercial Finance Ltd., were the mortgagee under two mortgages executed by the defendant in respect of two properties at No. 48 and No. 48A Bristol Road, Singapore.

f In this action, the plaintiffs claimed against the defendant two sums of \$310,000 and \$260,000 interest, possession of the Bristol Road properties and costs. On 20 February 1987, judgment was entered for a sum of \$672,276.25 and costs. The defendant was also ordered to give possession of the Bristol Road properties to the plaintiffs. There was no appeal against this judgment. Possession of the properties were given to the plaintiffs and were sold by them in May and July 1990. On 9 March 1988 the plaintiffs made an *ex parte* application under O. 50 r. 1 of the Rules of the Supreme Court 1970 for a charging order on another property at Bristol Court in which the defendant had a one-third interest, which was not subject of the mortgages. The application was for the Bristol Court property to stand charged for the sum of \$719,658.73 and costs of \$6,816.40 which were outstanding as at 31 January 1988. On 9 March 1988 the Assistant Registrar made a charging order *nisi* on the Bristol Court property for the sum of \$719,658.73.

h It is to be noted that the sum charged is not in strict compliance with O. 50 r. 1(4) which requires the amount of the judgment debt unpaid **at the time of the application** to be stated. As the application was filed on 9 March 1988, the sum outstanding should be computed to that day and not to 31 January 1988. The unpaid costs should also have been included in the computation. However, the defendant did not object to these errors, which resulted in a lower final figure being arrived at. Another shortcoming was that the charge *nisi* also did not identify the nature of the defendant's interest in the property that was charged.

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After obtaining the charging order *nisi*, the parties did not proceed with the hearing to make it absolute. By consent the matter was adjourned *sine die*. As stated earlier, the plaintiffs went into possession of the Bristol Road properties as mortgagee in possession. They rented out the properties and eventually sold them in 1990. Disputes arose between the parties over the amount owing by the defendant to the plaintiffs. On 8 October 1990, the plaintiffs applied to restore for hearing the application to make absolute the order *nisi*. On 1 November 1990, the defendant filed an action Suit No. 1951 of 1990 against the plaintiffs for damages and other reliefs arising out of the plaintiffs alleged breach of their duties as mortgagee and mortgagee in possession.

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On the hearing of the application before the Assistant Registrar, the defendant's Counsel argued that the charging order *nisi* should be discharged on four grounds - that the plaintiffs rented out the Bristol Road properties below market value, that they wrongfully withheld their consent to sell the properties, that they caused deterioration to the properties, and that they failed to render accounts of the rentals received and the amounts outstanding under the mortgages. None of these complaints relate to the computation of the outstanding amount of the judgment sum.

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In fact the plaintiffs had rendered accounts as of 31 August 1990 and 26 November 1990, but they were disputed by the defendant. The thrust of his Counsel's arguments was that unless there were proper accounts (by which he apparently meant accounts accepted by the defendant or adjudged to be proper accounts), the defendant did not know what was owing and was unable to make payment to clear the charge. (The plaintiffs also tendered a revised set of accounts as of 26 November 1990, which I will refer to later.) After listening to his arguments, the Assistant Registrar declined to make absolute the charging order *nisi*, and instead discharged it with costs.

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In the appeal, the same submissions were made, which presupposed that before a charging order can be made absolute, any variations in the debt outstanding must be taken into account.

A charging order is made in two stages, the first an *ex parte* application for an order *nisi*, and the second an *inter partes* hearing for an order absolute after the order *nisi* has been served on the party affected. When the order is made absolute, it takes effect from the date of the decree *nisi*. This is clearly established in *Haly v. Barry* [1868] Ch App 452 and *Brereton v. Edwards* [1888] 21 QBD 488.

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In *Haly v. Barry*, Selwyn LJ said:

The question turns upon this, whether the charging order is to be considered as one or two. It has been urged that there are two orders, and that the first goes for nothing unless followed by the other order. The language of the Act appears to be quite opposed to this view, it speaks of one order which is at first an order *nisi*, and it is afterwards made absolute. (The Act referred to was the Common Law Procedure Act 1852).

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In *Brereton v. Edwards* Lord Esher said of the passage quoted that:

That decision seems to me to amount to this, that the order *nisi* is the charging order, but that it stands in abeyance until it is made absolute. When, however, it is made absolute the order *nisi* is the charging order, and it takes effect from the date when it was originally made.

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and Lindley LJ said:

Haly v. Barry shows that the effect of the two orders - the order *nisi* and the subsequent order absolute - was to charge the fund as from the date of the order *nisi*, and I can see no

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- a** difference in principle for this purpose between a charging order made under the statutory power, and a similar order made under the general jurisdiction of the Court. The charging order, when it was made absolute, related back to the date of the order *nisi*.
- An order absolute is therefore not a second charge, but a confirmation of the order *nisi*. What matters are relevant for consideration in deciding whether to discharge a charge *nisi* or to make it absolute? Matters relating to the making of the charge *nisi*, that is, the
- b** identification of the judgment debt and the outstanding amount thereon, the property or interest in it that is sought to be charged, would obviously be relevant. If there are errors here which need to be rectified, the charge should be made absolute only after that is done, or it should be discharged.
- The Court has a wide discretion whether to make a charge *nisi* absolute. The main question
- c** to be considered is whether the chargor should be given the advantage over the unsecured creditors of having his debt secured, see *Rainbow v. Moorgate Properties Ltd.* [1975] 2 All ER 821, and *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.* [1982] 1 All ER 685 and [1983] 1 All ER 564.
- In the latter case, Lord Brandon, who sat in the Court of Appeal, listed seven principles for making a charging order absolute:
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- (1) The question whether a charging order *nisi* should be made absolute is one for the discretion of the court.
 - (2) The burden of showing cause why a charging order *nisi* should not be made absolute is on the judgment debtor.
 - (3) For the purpose of the exercise of the Court's decision there is, in general at any rate, no
- e** material difference between the making absolute of a charging order *nisi* on the one hand and a garnishee order *nisi* on the other.
- (4) In exercising its discretion the Court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order *nisi*.
 - (5) The Court should so exercise its discretion as to do equity, so far as possible, to all the
- f** various parties involved, that is to say the judgment creditor, the judgment debtor, and all other unsecured creditors.
- (6) The following combination of circumstances, if proved to the satisfaction of the Court, will generally justify the Court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgment is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable
- g** prospect of succeeding.
- (7) In the absence of the combination of circumstances referred to in (6) above, the Court will generally be justified in exercising its discretion by making the order absolute.
- This case went on appeal to the House of Lords where it was held, in respect of the sixth
- h** principle, that an order ought not be made absolute when the property of an insolvent debtor becomes subject to a statutory scheme, even if there is no scheme of arrangement agreed between the creditors.
- As these general principles are not exhaustive, it still has to be determined in the present case whether the dispute over accounts and the defendant's allegations of breach of duty on the part of the plaintiffs are sufficient causes for refusing to make absolute the order
- i** *nisi*. As pointed out earlier, a charging order *nisi* should be for the amount of the judgment

debt outstanding on the day of the application for the order to be made absolute, and when the order is made absolute, it relates back to the date of the order *nisi*. The order absolute takes effect from the date of the order *nisi* for the sum owing on the day when the order absolute was applied for. That sum will not be increased by any interest accruing in the intervening period, or be reduced by any payments made in that time, or any damages payable by the creditor to the debtor.

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As for the argument that a debtor has to know the exact amount payable to release the charge, this is not a reason for denying the creditor the security of a charge. The sum specified in a charging order is not necessarily the sum to be paid to free a charge. If there are earlier payments made by the debtor or if there are accounts to be taken, the amount may be reduced. It is a fallacy to take the charging order to have fixed the amount due from the debtor to the creditor, or to remove the debtor's right to proper accounts; these are matters to be considered separately.

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I therefore find the defendant has not shown cause why the charging order *nisi* should not be made absolute. I allow the plaintiffs' appeal and set aside the Assistant Registrar's order discharging the order *nisi* with costs to the defendant. The charge *nisi* is to be made absolute with the modification that it shall relate specifically to the defendant's one-third interest in the property. The plaintiffs shall have the costs of the appeal.

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There was a related matter that came on appeal before me. The defendant applied for a stay of execution of the plaintiffs' judgment pending the trial of his claims in Suit No. 1951 of 1990. This application was also granted by the Assistant Registrar with costs.

The defendant based his application on similar grounds, that is that there is a dispute over the amount outstanding arising from the plaintiffs' failure to render proper accounts and that he has a claim for damages against the plaintiffs arising from their failure to discharge their duties as mortgagee and mortgagee in possession.

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In evaluating the merits of this application, I found three matters to be particularly relevant. Firstly, the plaintiffs have produced in an affidavit filed on 1 April 1991 a set of revised accounts as of 26 November 1990 showing a sum of \$343,215.65 which the defendant has not disputed or commented on. Secondly, the defendant has not been diligent in prosecuting his claims in Suit No. 1951 of 1990. His Counsel admitted that although leave to make further amendments to the statement of claim in the action was given on 10 May 1991, the further amended statement of claim has yet to be filed or served when the appeal was argued before me on 14 August 1991. Lastly, other than referring to the dispute over the accounts and his pending claims, the defendant has not identified any special circumstances in support of his application beyond saying that "it is inequitable for the plaintiffs to execute the judgment against me now."

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In all the circumstances, the defendant has not persuaded me that there should be a stay of execution of the plaintiffs' judgment. I allow the plaintiffs' appeal and set aside the Assistant Registrar's order. The defendant is to pay to the plaintiffs the costs of the appeal and below.

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Also found at [1991] 3 CLJ 2614

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